Eddie Lee Kim Tak & Ors v Jurutera Konsultant (SEA) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-682 OF 1998
KAMALANATHAN RATNAM J
4 JANUARY 1999

Civil Procedure *— Injunction — Application for interlocutory injunction — Summary judgment given to plaintiff did not consider defendants' defence of set-off — Defendants appealed against order for summary judgment —Whether application should be granted*

The parties in this suit had agreed to arrived at a settlement to resolve all issues between them. However, upon failing to arrive at an agreeable sum for their respective claims, the plaintiffs filed this suit, claiming various orders and declarations. Having filed their defence, the defendants claimed a right of set-off and counterclaimed. Subsequently, the High Court granted the plaintiffs' application for summary judgment. The defendants appealed against the High Court's decision. Pending the hearing of the summary judgment, the plaintiff filed an application for, an injunction against the first, second and third defendants, and order for disclosure of the full value amount of the assets of the defendants, to be verified by an affidavit. The issue for determination was whether the plaintiffs' application for injunction should be granted.

Held, dismissing the application:

(1) The defendants had claimed the defence of set-off and also counterclaimed. Although the judgment of the High Court had considered in detail the counterclaim, and dismissed it as not bona fide, it had not reflected on the issue of whether the defence of set-off was at all considered. Authorities have shown that where the defendant had a bona fide claim, which could be set up as an equitable set-off against the amount claimed by the plaintiff, unconditional leave to defend should be given to the defendant. In this case, such a defence of set-off was not shown to have been considered. On this issue alone, the court dismissed the application for an injunction (see p 431H–432B).

(2) Since the defendants have appealed against the order for summary judgment, and since this application is premised entirely on that said judgment, it is only proper that status quo be maintained by holding the position as it was, prior to the filing of this suit (see p 432C–D).

[Bahasa Malaysia summary

Parti-parti di dalam guaman ini telah bersetuju untuk mencapai satu penyelesaian bagi menyelesaikan semua isu di antara mereka. Akan tetapi, setelah gagal untuk bersetuju ke atas jumlah bagi tuntutan masing-masing, plaintif-plaintif telah memfailkan guaman ini, dan

menuntut berbagai perintah dan deklarasi. Setelah memfailkan pembelaan mereka, defendan-defendan menuntut hak tolakan dan telah membuat tuntutan balas. Seterusnya, Mahkamah Tinggi meluluskan permohonan plaintif-plaintif untuk penghukuman terus. Defendan-defendan merayu terhadap keputusan Mahkamah Tinggi. Sementara menunggu perbicaraan penghakiman terus itu, plaintif telah memfailkan satu permohonan bagi satu injunksi ke atas defendan-defendan pertama, kedua dan ketiga dan satu perintah bagi mendedahkan jumlah nilai sepenuhnya aset-aset defendan yang akan ditentusahkan oleh satu afidavit. Isu untuk diputuskan adalah sama ada permohonan plaintif-plaintif untuk satu injunksi sepatutnya diluluskan.

Diputuskan, menolak permohonan:

(1) Defendan-defendan telah menuntut pembelaan tolakan dan juga telah membuat tuntutan balas. Walaupun penghakiman Mahkamah Tinggi telah mempertimbangkan dengan teliti tentang tuntutan balas itu dan telah menolaknya kerana mendapati ia tidak suci hati, penghakiman itu tidak memikirkan isu sama ada pembelaan tolakan telah dipertimbangkan atau tidak. Autoriti-autoriti menunjukkan bahawa apabila defendan mempunyai satu tuntutan yang suci hati, yang boleh didirikan sebagai satu tolakan ekuiti terhadap jumlah yang dituntut oleh plaintif, kebenaran membela tanpa syarat sepatutnya diberi kepada defendan. Di dalam kes ini, pembelaan tolakan tidak ditunjukkan bahawa ia telah dipertimbangkan. Atas isu ini sahaja, mahkamah menolak permohonan untuk injunksi (lihat ms 431H–432B).

(2) Disebabkan defendan-defendan telah merayu terhadap perintah untuk penghakiman terus, dan disebabkan permohonan ini hanya berdasarkan perintah tersebut sepenuhnya, tindakan betul adalah untuk memastikan status quo dikekalkan dengan berpaut kepada keadaan terdahulu, iaitu sebelum guaman ini difailkan (lihat ms 432C–D).

Notes

For cases on application for interlocutory injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1929–1930.

Cases referred to

Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130 (refd)

Morgan & Sons Ltd v S Martin Johnson & Co Ltd [1949] 1 KB 107 (refd)

Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (refd)

Legislation referred to

Rules of the High Court 1980 O 27 r 3

Lee Chan Leong (Chan Leong & Co) for the applicants/plaintiffs.
Joseph Yeo (Joseph Yeo) for the respondents/defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The first plaintiff was, at all material times, the managing director of all the three defendants. Various disputes arose between the parties to this action and as a result thereof, numerous actions were commenced by the plaintiffs against the defendants and vice versa. For the purposes of these proceedings, I do not intend to go into the details of the various actions. Whilst the various suits were at various stages of proceedings, the parties herein arrived at a settlement through intermediaries to resolve all issues once and for all. The defendants made an offer of settlement by way of a letter, dated 6 May 1998, which the plaintiffs accepted.

Terms of settlement

The salient terms of the settlement agreement are, inter alia, as follows:

(a) The first plaintiff shall pay to the defendants all monies, claimed by the defendants to have been taken by or given to the first plaintiff, provided that the said claims are supported by proper documents — Clause 2 at p 1.

(b) The first plaintiff agrees to pay to the defendants all and any payment made by the defendants to him for his personal use, provided such payments are evidenced and supported by payment voucher, acknowledgement of receipt, pay-in slip or debit advice and bank statement — Clause 2 at p 3.

(c) The share holding of the first plaintiff in all properties owned by the defendants and cash in hand, and the other interest as listed under cl 3 shall form part of the settlement exercise — Clause 3 at p 1.

(d) The plaintiffs have agreed to sell, and the defendants have agreed to purchase, the undivided one quarter share of the third plaintiff in Wisma JK for the sum of RM2.8m — Clause 3.1 at p 1 and cl 1 at p 3.

(e) The first plaintiff is entitled to 35% share of all properties owned by the defendants in which he holds equity shares — Clause 3.2 at p 2.

(f) The first plaintiff is entitled to 35% share of all cash in hand in the defendants as at 25 October 1995, less all mandatory costs and other debts due, existing and owing, on and before 25 October 1995. The first plaintiff agrees to accept the audited account for 1994 or earlier, currently submitted as the basis of computation of his share — Clause 3.3 at p 2.

(g) 500,000 units of Lingui shares registered in the name of the second plaintiff shall be returned to her — Clause 3.4 at p 2.

(h) Broomloan Consultant Ltd, Associated Consultant Sdn Bhd, First Engineering Services Ltd, Rogers Traders Ltd and Marsham Ltd will not commence any action or make any claim against the first plaintiff in respect of any payments made to him — Clause 3.5 at p 2.

(i) Following court judgments passed, to date, which allow the defendants to claim for court costs from the plaintiffs, such amount as may be submitted by the defendants shall form part of the settlement exercise — Clause 4 at p 2.

(j) Both parties shall, upon reaching an agreement on the 'final nett amount', prepare an official, typed 'Settlement agreement' stating the agreed 'final nett amount' due from one party to the other, and the terms and mode of settlement — Clause 5 at p 2.

(k) The 'Settlement agreement' shall be construed as a total and final settlement of all disputes between the two parties. Neither party shall make any claim or institute any legal action whatsoever against the other, locally in Malaysia or through legal agencies in any foreign country — Clause 6 at p 2.

(l) In consideration of the settlement agreement, the defendants shall not make any claim of ownership, legal or beneficial in the third plaintiff and Teknologi Cerucuk Pertama — Clause 8 at p 2.

(m) In the event the parties cannot agree on the quantum of settlement, the disagreement may be referred to the court — Clause 12 at p 3.

(n) All the relevant court cases already commenced by the parties shall be withdrawn with immediate effect except the winding up petitions instituted against the first and second defendants, which shall be withdrawn, but all properties involved shall not be sold — Clause 12 at p 3.

(o) Both parties agree that the decision of the High Court shall be final and conclusive and binding on the parties. The parties further undertake not to appeal against the High Court decision — Clauses 13 and 6 at p 3.

(p) Any other matters not covered pertaining to the settlement will be further negotiated, provided, always that this is without prejudice to whatever claim the first plaintiff may have against any party in any pending action — Clause 4 at p 3.

Defendant's quantification

The defendants duly quantified their claims and submitted them to the first plaintiff to be included in the final nett amount without any supportive documents (pursuant to cl 5 at p 2). Their quantification read as follows:

(a) RM45,517,046.01

(b) HK$1,823,023.50

A (c) USD333,870.37

(d) S$2,921,621.75

(e) Brunei $4,055,790.60

The plaintiffs, however, disputed the defendants' quantification and rejected the said claims.

B

Plaintiff's quantification

By a letter, dated 25 May 1998, the plaintiffs submitted their claim against the defendants amounting to RM18,308,435.54, together with supporting documents.

C

This claim

On 23 June 1998, the plaintiffs herein filed this suit in a state High Court claiming, inter alia, orders and declarations, namely:

D (a) an order that the defendants are liable to pay to the plaintiffs a sum of RM18,308,435.54 within seven days from the date of the order;

(b) a declaration that the plaintiffs are not liable to the defendants for any sum of money by reason of the failure of the defendants to support their claim with proper documents;

E (c) a declaration that the defendants are liable to pay to the plaintiffs a sum of RM13,100,496, in lieu of the plaintiffs' entitlement in all the properties of the defendants; and

(d) an order directing the first defendant to pay a sum of RM2,520,000, under a sale and purchase agreement.

F *Defence, set-off and counterclaim*

Having filed their defence, the defendants also claimed a right of set-off and counterclaimed. They claimed a set-off of the sums claimed by them as stated earlier, and rejected by the plaintiffs. They also counterclaimed for various declarations which are too numerous to reproduce for the purposes G of these proceedings, except that it is necessary to reproduce the first declaratory order prayed for, which was 'that upon the true construction of cl 12 of the settlement agreement, the term "agree on the quantum of settlement" shall be in reference only to the specific item/s of claim/s disputed and not on the issue of liability to pay'.

H *Summary judgment*

On 2 September 1998, the state High Court heard encl 4, which was the plaintiffs' application for summary judgment, and granted order in terms of the prayers enumerated above.

I *Application by defendants to transfer the case to Kuala Lumpur*

The defendants, in the meantime, filed an application (encl 7) to transfer this case to be heard in Kuala Lumpur, since all the other actions and suits

had been filed in Kuala Lumpur, except for a bankruptcy petition filed by the first defendant against the first plaintiff, which was filed in the said state High Court, on residential grounds. The defendants also contended that the third plaintiff's registered address was in Kuala Lumpur and that the first and second plaintiffs were directors of the third plaintiff. The defendants also averred that since this suit arose as a result of an alleged non-compliance of the terms of a settlement agreement which was arrived at in connection with all the legal actions which were filed in Kuala Lumpur, this suit ought properly to be heard in Kuala Lumpur. This application was also scheduled for hearing on 2 September 1998, together with encl 4. However, only encl 4 was proceeded with and encl 7 was adjourned to 1 October 1998.

The present application for injunction — Enclosure 15

Pending the hearing of the application for summary judgment, the plaintiffs filed an application (encl 15) on 21 Ogos 1998, for, inter alia, an injunction restraining the first defendant, whether by its directors or servants or agents, from disposing of, mortgaging, assigning, charging or otherwise dealing, with any of its assets within the jurisdiction including, but not limited to any sums of money presently in its possession and/or control or subsequently coming into its possession and/or control, and the landed properties presently registered in the name of the first defendant and in a Standard Chartered Bank account.

A similar order was applied for against the second and third defendants. The plaintiffs also applied for an order for disclosure of the full value of the assets of the defendants within the jurisdiction of this court, to be verified by an affidavit.

Findings of the court

This file has since been transferred to the Civil Division at Kuala Lumpur. Whilst it is totally inappropriate for this court to look into the reasons for the summary judgment having been entered, I was of the view that for the purposes of the present application, I am at liberty to consider the issues of set-off and counterclaim, as raised in the defence. The distinction between a counterclaim and a set-off was well illustrated by Salleh Abas LP in *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157. His Lordship said, at p 160:

> A set-off is a cross-claim for a sum of money by a defendant against a plaintiff's claim for another sum of money for which the defendant is being sued. A cross-claim is not necessarily a set-off, merely because the word used in the pleading is 'set-off'. Whether or not the plea is a set-off, it has to be determined as a matter of law and substance (see *Hanak v Green* [1958] 2 QB 9 at p 26). A cross-claim which is accepted as a defence of set-off has the effect of extinguishing either the whole or part of the plaintiff's claim (see *Re A Bankruptcy Notice* [1934] Ch 431 at p 437). But to constitute a set-off the sum of money meant as a cross-claim must, from its nature and quality, be such that it is proper to be dealt with as a defence to the plaintiff's claim and not as a separate cause or matter.

> At common law, a right of set-off was not recognized despite the fact that a defendant had a valid claim against a plaintiff. Thus, in order to prevent imprisonment of such a defendant, two statutes, known as statutes of set-off, were passed in 1728 and 1734. Although these statutes and the subsequent statutes were repealed, the principle has been preserved by successive statutes even to this day. In addition to the statutory set-off, the court of equity has all along been in the habit of allowing a defendant to restrain a plaintiff from proceeding at law, where in view of the defendant's cross-claim, the court thinks that it is unjust for the plaintiff to proceed with his suit at law. This is known as 'equitable set-off' and it operates, as Lord Cottenham LC said, where there is an equity which goes to impeach the title of the legal demand (see *Rawson v Samuel* (1841) Cr & Ph 161 at p 178; 41 ER 451). The fusion of the law and equity in 1873 does not affect this principle either.

His Lordship continued to define a counterclaim as follows (at p 161):

> A counterclaim, on the other hand, is also a cross-claim which a defendant has against a plaintiff, but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so. Thus, to all intents and purposes, a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuity of suits. Like set-off, a counterclaim is also the creation of statutes. At common law the court has no power to allow an action by a plaintiff to be met by a cross-claim of the defendant against the plaintiff. The court simply left the defendant to commence a separate action. It was only by virtue of the Supreme Court of Judicature Act 1873, s 24(3), that enabled the defendant's counterclaim to be added to the plaintiff's suit.
>
> In so far as our law is concerned, a counterclaim is governed by the provisions of O 15 r 2 which we have already set out earlier.
>
> It is, therefore, clear that a counterclaim is wider than a defence of set-off and that whilst the former is a separate action by a defendant against a plaintiff, the latter is essentially a defence, although a defendant is entitled to add it as a counterclaim. Being a defence to a plaintiff's action, the matter sought to be a set-off must essentially be connected with or form part of the matter upon which the plaintiff's action is founded.

In fact, in that case, the Federal Court, having considered the defence of set-off and counterclaim in respect of an application for final judgment under O 27 r 3 of the Rules of the High Court 1980, on the grounds that the respondents had made admissions to the appellants' statement of claim, dismissed the appellants' appeal for final judgment. The Federal Court held that only equitable and not legal set-off is part of our law and that this court can only deal with an equitable set-off. Here, the defendants had claimed a defence of set-off and also counterclaimed. A court of competent jurisdiction has found that there is no basis to sustain a counterclaim.

Clearly, there is a difference between a defence of set-off and a counterclaim. As held by the Federal Court, a counterclaim is wider than a defence of set-off. A copy of the written judgment has been annexed to the affidavit of the first plaintiff and marked as exh LKT–3. The judgment considers in detail the counterclaim, and dismisses it as not bona fide. However, the issue of whether the defence of set-off was at all considered, has not been reflected in the judgment nor in the order of the court. As has

been illustrated earlier, the defence of set-off is clearly available so long as the defendant is able to show that in equity, at least, it is unjust to allow for the summary judgment. In *Morgan & Son Ltd v S Martin Johnson & Co Ltd* [1949] 1 KB 107, the Court of Appeal showed the importance the court places to such a defence of equitable set-off by holding that where the defendant had a bona fide claim, which could be set up as an equitable set-off against the amount claimed by the plaintiff, unconditional leave to defend should be given to the defendant. In this case, such a defence of set-off was not shown to have been considered. On this issue alone, I dismiss this application for an injunction.

The House of Lords in deciding on the preservation of the status quo in the case of an interlocutory injunction held in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, that the status quo referred to would be the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction. In the circumstances, since the defendants have appealed against the order for summary judgment, and since this application for injunction is premised entirely on that said judgment, it is only proper that status quo be maintained by holding the position as it was, prior to the filing of this suit.

I do not think it is necessary for me to consider the other issues raised by the defendants.

Application dismissed.

Reported by Mohd Rizal Abidin